

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>CLARA J. THOMAS</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 230,684
<b>HALLMARK CARDS, INC.</b>	)	
Respondent	)	
Self-Insured	)	

**ORDER**

Respondent appealed the May 16, 2003 Award entered by Administrative Law Judge (ALJ) Robert H. Foerschler. The Appeals Board (Board) heard oral argument on December 2, 2003. <sup>1</sup>

**APPEARANCES**

Claimant appeared by Michael A. Preston of Overland Park, Kansas. Respondent appeared by John David Jurcyk of Roeland Park, Kansas.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board (Board) and the parties stipulations are listed in the Award.

**ISSUES**

Judge Foerschler found claimant was entitled to permanent partial disability compensation based upon a 53 percent work disability. Judge Foerschler determined that claimant's fibromyalgia and chronic fatigue syndrome were not work-related and, therefore, claimant was not permanently and totally disabled as a result of her May 8, 1997 back

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<sup>1</sup> Oral argument to the Board was originally scheduled to be heard on November 4, 2003, but was continued at respondent's request.

injury. Judge Foerschler determined claimant would have the ability to earn \$7.00 per hour based upon her restrictions for the work-related injury without regard to the fibromyalgia and chronic fatigue syndrome. By imputing a post-injury wage based on ability, Judge Foerschler found claimant to have a 66 percent wage loss. The Judge determined claimant's task loss was 40 percent which, when averaged with the 66 percent wage loss resulted in a 53 percent work disability. Judge Foerschler further found respondent was entitled to a retirement offset in the amount of \$9.35 per week beginning July 31, 2000 for the lump sum retirement benefit respondent paid to claimant on that date. However, he denied a retirement credit for the \$131,786.52 lump sum profit sharing distribution respondent made to claimant on May 23, 2000, finding this was not a retirement benefit within the meaning of the statute.<sup>2</sup>

On appeal, respondent seeks review of the ALJ's findings concerning the nature and extent of claimant's disability, the amount of the retirement benefits to be credited against the permanent partial disability award, and the method of applying the credit.

Claimant likewise seeks review of the ALJ's work disability award, arguing claimant's fibromyalgia and chronic fatigue syndrome are work-related and, therefore, claimant is entitled to a permanent total disability award. Claimant further challenges respondent's entitlement to any credit or offset under K.S.A. 44-501(h) as neither lump sum distribution to claimant constituted a retirement benefit.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire record and the arguments of the parties, the Board finds as follows:

Claimant suffered personal injury by accident arising out of and in the course of her employment with respondent on May 8, 1997. On that date claimant was lifting a 30 pound roll of "poly" above her head when she felt a popping sensation in the middle of her back, beneath her shoulder blades. By later that day, the pain was all the way down to her low back.

Claimant reported her injury to respondent the next day and received authorized medical treatment.

As a direct and natural consequence of the pain from her back injury, claimant developed fibromyalgia and chronic fatigue syndrome. These conditions have caused

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<sup>2</sup> K.S.A. 44-501(h).

claimant to be permanently and totally disabled from engaging in substantial gainful employment.<sup>3</sup>

Claimant last worked for respondent on April 22, 1998. She was 46 years old. She was not eligible to retire. The earliest an employee can retire from Hallmark is at age 50. In May 2000 claimant received a \$131,786.52 distribution from respondent's profit sharing plan.<sup>4</sup> Claimant's right to receive her profit sharing account was due to a determination that she was permanently and totally disabled. Once an employee has been employed by respondent for more than five years, receipt of the profit sharing is not dependent upon a worker's age or years of service.

Claimant was born May 8, 1951 and at the time of the June 20, 2000 regular hearing, she was 49 years old. In July 2000 claimant received \$22,551.92 from her retirement account.<sup>5</sup> In a fashion similar to the protocols surrounding the profit sharing distribution, once an employee is with respondent for five years and then separates from the company for any reason, the worker is entitled to the cash balance in the retirement account. Here claimant's separation was due to disability, not her age or years of service. Payment of this benefit is not based upon a number of years of service, once the worker has passed the five year vesting period. Therefore, the ALJ's determination that respondent is entitled to a retirement offset for these payments should be reversed.<sup>6</sup>

**WHEREFORE**, the Board modifies the May 16, 2003 Award entered by Administrative Law Judge Robert H. Foerschler to a permanent total disability as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Clara J. Thomas, and against the respondent, Hallmark Cards, Inc., for an accidental injury which occurred May 8, 1997, and based upon an average weekly wage of \$833.28 for 54.21 weeks of temporary total disability compensation at the rate of \$338 per week or \$18,322.98, followed by 315.61 weeks of permanent total disability compensation in the sum of \$338 per week or \$106,677.02, for a permanent total disability, making a total award not to exceed \$125,000.

As of December 16, 2003, there is due and owing claimant 54.21 weeks of temporary total disability compensation at the rate of \$338 per week or \$18,322.98

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<sup>3</sup> K.S.A. 44-510c(a)(2).

<sup>4</sup> After taxes this amount was \$105,429.22.

<sup>5</sup> After taxes this amount was \$18,041.54.

<sup>6</sup> See *Green v. City of Wichita*, 26 Kan. App. 2d 53, 977 P.2d 283 rev. denied 267 Kan. 888 (1999); See also *Reeves v. Hallmark Cards*, No. 256,002, 2003 WL 1918550 (Kan. WCAB March 17, 2003).

followed by 290.65 weeks of permanent total disability compensation at the rate of \$338 per week or \$98,239.70, thereafter claimant is entitled to the remaining balance in the amount of \$8,437.32 shall be paid at \$338 per week for an approximate 24.96 weeks or until further order of the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael A. Preston, Attorney for Claimant  
John D. Jurcyk, Attorney for Respondent  
Robert H. Foerschler, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director